IN THE SUPREME COURT

STATE OF ARIZONA

FOOTHILLS RESERVE MASTER OWNERS ASSOCIATION, INC. Petitioner/Defendant, v. STATE OF ARIZONA, et al. Respondents/Plaintiffs.	Supreme Court No. CV-23-0292-PR Court of Appeals Division One Case No. 1 CA-CV 22-0371 Maricopa County Superior Court No. CV2017-010359

SUPPLEMENTAL BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE FILED WITH CONSENT OF ALL PARTIES

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Goldwater Institute is a public policy foundation dedicated to advancing principles of individual liberty, limited government, and property rights. Through its Scharf-Norton Center for Constitutional Litigation, it often represents parties in this Court, *see, e.g.,* *Gilmore v. Gallego*, 552 P.3d 1084 (Ariz. 2024), or appears as amicus curiae, *see, e.g.,* *Legacy Foundation Action Fund v. Citizens Clean Elections Commission*, 254 Ariz. 485, 493 ¶ 28 (2023), particularly in cases involving eminent domain. *See, e.g.,* *Cao v. PFP Dorsey Invs., LLC*, 257 Ariz. 82 (2024). The Institute drafted what became the Arizona Private Property Rights Protection Act, and Institute scholars have published extensive research about property rights and just compensation. *See, e.g.,* Timothy Sandefur, *Eminent Domain in the Washington and Arizona Constitutions*, 18 NYU J. L. & Liberty __ (forthcoming, 2025); Timothy & Christina Sandefur, *Cornerstone of Liberty: Property Rights in 21st-Century America* (2d ed. 2016). The Institute believes its expertise will aid the Court in considering this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court has asked whether Section 12-1122(A)(2) provides for compensation for proximity damages after condemnation of an appurtenant easement. The answer is yes. The Court of Appeals' holding to the contrary rested

on two errors: one relating to statutory construction and the other relating to the purpose of the statute.

ARGUMENT

I. The lower court erred in its interpretation of Section 12-1122(A)(2)'s wording.

The Court of Appeals' first error, detailed in Goldwater's amicus brief in support of the Petition for Review, was its misapplication of the *exclusio alterius* canon. The court erroneously employed that canon to conclude that the statutory provision promising compensation for the "property sought to be condemned" really means "*parcel* sought to be condemned." APP21 ¶ 19. Since easements don't come in "parcels," the court held that compensation isn't available. But as Goldwater explained previously, the *exclusio alterius* rule does not apply here, because Section 12-1122 doesn't purport to create a "unum," which is required before that rule can apply. Antonin Scalia & Bryan Garner, *Reading Law* 107 (2012). That means "property sought to be condemned" is *not* synonymous with "parcel sought to be condemned." *See* Goldwater Amicus Brief in Support of Petition for Review at 3–8.

The better reading of the statute is not to change its meaning, *Kilpatrick v. Superior Ct.*, 105 Ariz. 413, 421–22 (1970), but to conclude that it applies to the taking of *any* "property," whether it comes in parcels or not, if that property happens to be "part of a larger parcel." And an appurtenant easement (including a

negative one) can easily be "part of a larger parcel," since that's just what "appurtenant" means. *See* Black's Law Dictionary 103 (6th ed. 1990).[1] It's one of the sticks in the owner's bundle, which the government is taking, and when such a taking imposes severance or proximity damages on the owner, the statute requires compensation for that, as well as the taking itself.

In *Wasatch Gas Co. v. Bouwhuis*, 26 P.2d 548, 553 (Utah 1933), the Utah Supreme Court held that that state's severance/proximity damages statute,[2] which is identical to Arizona's, applied where a utility company sought to condemn an easement beneath a farmer's land. The court had no difficulty with the proposition that the easement qualified as "property sought to be condemned," and held that the proper valuation was to deduct "the value, if any, of the use and occupation of the strip reserved to the [farmer]" from "the market value of the strip itself as a part of the tract without the easement." *Id.* This, it said, would be "about the same thing as showing the market value per acre of the tract of which the strip was a part without the easement, and then the market value of the strip with the easement upon it." *Id.*

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[1] In *City & County of San Francisco v. Calderwood*, 31 Cal. 585, 589–90 (1867), the California Supreme Court said that because an easement is incorporeal, it cannot be "part of" a parcel. But that is precisely the overly formalistic approach that the court repudiated in *S. Cal. Edison Co. v. Bourgerie*, 507 P.2d 964, 966–67 (Cal. 1973).

[2] Utah Code § 78B-6-511(1)(b).

In *Childers v. United States*, 116 Fed. Cl. 486 (2013), the Court of Claims found that the conversion of a railroad easement to a recreational hiking easement constituted a taking which entitled the adjoining landowner to compensation—and held that severance damages were available. *Id.* at 496–97, 515–17. The court had no difficulty regarding something as incorporeal as the conversion of an existing easement to another use—a property interest that certainly doesn't come in "parcels"—as the kind of real property interest that triggered the severance damages requirement. *See id.* at 497 ("'Where the property interest permanently taken is an easement' … just compensation includes severance damages—the diminution in value in the owner's remaining property resulting from the taking." (citation omitted)).

The distinction between positive and negative easements is immaterial. "[T]he extinguishment of a restrictive covenant by public authority for public use is compensable since such a covenant is in large measure identical with the express grant of a positive easement." *Probasco v. City of Reno*, 459 P.2d 772, 773 (Nev. 1969) (internal citation omitted); *accord, Bourgerie*, 507 P.2d at 966 (citing cases); *United States v. Certain Land in City of Augusta*, 220 F. Supp. 696, 699 (D. Me. 1963) (condemnation of restrictive covenants was a taking of property under the Fifth Amendment).

True, there are limits to what qualifies as "part of a larger parcel." Courts typically hold that something is only part of a larger parcel if the pieces of the severed property are contiguous and subject to unified ownership; this is sometimes referred to as the "three unities" test. *See, e.g.,* *State ex rel. State Highway Dep't of N.M. v. Strosnider*, 747 P.2d 254, 257 (N.M. App. 1987). But that test is easily satisfied here, because the easement was unified with the real property before the taking.

In short, there's no good reason not to count the easements here as "property" for purposes of Section 12-1122(A)(2).

The state seeks to bolster the Court of Appeals' holding by citing *City of Scottsdale v. Eller Outdoor Advertising Co. of Arizona*, 119 Ariz. 86, 93 (App. 1978), which said that "severance damages are only collectible for the partial taking of a whole parcel of real property," but viewed in context, that statement does not support the state's argument. That case involved the taking of some freeway billboards, which were subject to a federal law under which billboards were "deemed" real property even though they are not. *See* *id.* at 92. The court held that despite this "deeming," the billboards remained personal property, not real property, for state-law purposes, *see* *id.*, and then added that under state law, "severance damages are only collectible for the partial taking of a whole parcel of *real* property. Since the billboards were *personal* property, regardless of any

incidental damages suffered, such damage was not compensable." *Id.* at 93 (citation omitted; emphasis added). In other words, the reason severance damages weren't available was because the billboards, being personal instead of real property, weren't covered by the severance-damages statute. Easements, however, are real, not personal property, *Beville v. Allen*, 28 Ariz. 397, 400 (1925), so *Eller Outdoor Advertising* is irrelevant.

But in any event, as the California Supreme Court observed in *Bourgerie*, *supra*—the case most closely analogous to this one—courts ought to focus not on "esoteric" and "abstract" formalities, but on "pragmatic considerations of public policy," and particularly on the need to avoid "placing a disproportionate share of the cost of public improvements upon a few individuals." 507 P.2d at 967–68. In other words, the Court should presume in favor of compensation.

II. The history of Section 12-1122(A)(2) shows that it was intended to compensate for situations such as this.

The Court of Appeals' second error was historical. The "part of a larger parcel" statute was created precisely to protect property interests that are incorporeal, or that otherwise aren't "parcels." It was written out of a concern that the early nineteenth century rule against compensation for "consequential" damages failed to adequately protect property owners—especially against the obstruction of easements such as rights-of-way and the consequential injuries inflicted on adjacent owners by infrastructure improvements.

Section 12-1122 originated in 1872, as part of the first California Code of Civil Procedure.[3] *See* Cal. Civ. Pro. § 1248(2) (1872), *now codified at* Cal. Civ. Pro. § 1263.410. It was motivated by a belief that condemnations for railroads and other infrastructure improvements often—in the words of a delegate to California's 1879 Constitutional Convention—"cut up [a property owner's untaken land] into inconvenient shapes: by taking a fair open field where plowing and agricultural work would be done … so that a man instead of having a fair field to plow would have it divided into an irregular and inconvenient shape … so that it ceased to be valuable for pasture, and diminished its value." *1 Debates and Proceedings at the California Constitutional Convention of 1878-79* 348 (1880) (Remarks of Mr. Barnes).

Even more worrisome to nineteenth century constitution-makers was the harm caused to the retained property by the use to which the taken portion was put. Before the 1870s, many state courts had held that a property owner was not entitled to compensation if the government used taken land in a way that interfered with the owner's use of the retained portion. In *Murphy v. City of Chicago*, 29 Ill. 279 (1862), for example, the government condemned land in front of the owner's property, built a railroad, and as part of the construction, used the land for

[3] "Nearly all of the Arizona statutes pertaining to eminent domain were adopted from California." *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133 (1965).

excavated dirt and rocks, which obstructed her use of the property she retained. The court said the city was not liable, because although "[s]ometimes portions of a street are occupied by building materials, to the great inconvenience of a neighbor," the owner "must submit to it from necessity, and without compensation." *Id.* at 286–87. Many other state courts likewise, calling the harms that resulted from the use to which the taken portions of their land were put, "consequential" and "*damnum absque injuria.*" *See, e.g.*, *Henry v. Pittsburgh & Allegheny Bridge Co.*, 8 Watts & Serg. 85, 85–86 (Pa. 1844); *Clark v. Town of Saybrook*, 21 Conn. 313, 325 (1851); *Homochitto River Comm'rs v. Withers*, 29 Miss. 21 (1855), *aff'd sub nom*. *Withers v. Buckley*, 61 U.S. 84 (1857). That meant that if the government condemned land in front of a store and built something blocking access to it, the owner "must submit to the burthen." *Moses v. Pittsburgh, Ft. Wayne & Chi. R.R. Co.*, 21 Ill. 516, 523 (1859).

Public outcry about the unfairness of this rule led to reforms in many states in the 1870s, notably at the 1869–70 Illinois Constitutional Convention, which fashioned the first constitutional clause requiring compensation for the "damag[ing]" as well as the taking of property. *See generally* Mareen E. Brady, *The Damagings Clauses*, 104 Va. L. Rev. 341 (2018). The "damaging" clause was quickly adopted into many other state constitutions in the decades that followed, including, of course, Arizona's. Ariz. Const. art. II § 17. The "damaging" clause

was intended to apply to "externalities placed on owners by infrastructural growth." Brady, *supra* at 361. *See also* Sandefur, *Eminent Domain, supra,* at 32–46.

A parallel reform was the establishment of rules requiring compensation for severance and proximity damages. The California innovation of 1872 was soon copied into the laws governing the western territories, including Arizona. *See* Revised Statutes of Arizona § 1772(2) (1887); *see also* Revised Statutes of Idaho Territory § 5220(2) (1887); Mont. Code Civ. Pro. § 590(2) (1879).[4] These were worded precisely the same as Arizona's current Section 12-1122(A)(2).

These two protections—the constitutional "damaging" clause and the statutory requirement for severance/proximity damages—have been interpreted by other state courts as requiring compensation for the diminishment in value of the remaining parcel after the taking of an appurtenant easement. *See, e.g., Santa Clara Cnty. v. Curtner*, 54 Cal. Rptr. 257, 265 (App. 1966); *Provo City Corp. v.*

[4] Old as this statute is, however, it has never included a definition section. Thus, as the California Supreme Court observed, "[t]he legal definition of the larger parcel is in the process of judicial development." *City of San Diego v. Neumann*, 863 P.2d 725, 730 n.3 (Cal. 1993). Perhaps mindful of the fact that the goal of the severance/proximity damages statute was to protect property owners, California courts have interpreted it "flexibl[y]," even holding that non-contiguous parcels owned by a single owner can still be regarded as effectively a single parcel for purposes of severance damages. *Id.* at 730. Likewise, given this Court's commitment to interpreting eminent domain statutes narrowly to protect property owners, *see, e.g., City of Phoenix v. Harnish*, 214 Ariz. 158, 161–62 ¶ 12 (App. 2006), it should interpret the statute liberally to protect the Appellees.

Knudsen, 558 P.2d 1332, 1334 (Utah 1977); *St. Clair Cnty. v. Bukacek*, 131 So.2d 683, 688–89 (Ala. 1961).

California courts in particular have regularly held that the taking of an appurtenant easement gives rise to severance damages under the statute. *See, e.g., People by & through Dep't of Pub. Works v. Renaud*, 17 Cal. Rptr. 674, 676–77 (App. 1961) (citing cases). *See further Los Angeles Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp.*, 941 P.2d 809, 821 (Cal. 1997) ("Severance damages are not limited to special and direct damages, but can be based on any factor, resulting from the project, that causes a decline in the fair market value of the property."). Given that California is where Section 12-1122(A)(2) comes from, that state's rulings are entitled to special weight. *State ex rel. Miller v. Filler*, 168 Ariz. 147, 150 (1991).

Proximity/severance damages for the taking of negative easements makes good sense. The reason western states adopted the law that became Section 12-1122—and the reason for the "or damaged" provision in the constitutions of Arizona and other states—was to ensure compensation for "consequential" damages, and particularly for the harm to retained property resulting from the government's use of the taken portion, or for the government's taking of, or interference with, access rights and other appurtenant easements—as this Court acknowledged in *Mosher v. City of Phoenix*, 39 Ariz. 470, 482–83 (1932).

The Idaho Supreme Court also remarked upon this in *Hughes v. State*, 328 P.2d 397 (Idaho 1958). There, the owner of business property with two access easements sued for compensation when the government built a new bridge that obstructed those easements. *Id.* at 398. Idaho still had (and has) the same severance-damages statute as Arizona, dating to territorial days. *See id.* at 400. And because an appurtenant easement is a property right that can be taken, *id.* at 401, the owner was entitled to "the damages which will accrue to the portion not sought to be condemned by reason of the severance of the portion—the right of access—sought to be condemned, and the construction of the improvement." *Id.* at 402. Significantly, the court noted that Idaho's Constitution does *not* include "taken or damaged" clause. *See id.* at 400. But it nevertheless said the diminishment in value of the owner's remaining property was compensable under the severance-damages statute (which, again, is identical to Arizona's). *See id.* It follows that in Arizona, which *does* have an "or damaged" clause, reinforced by the severance-damages statute, such compensation is even more warranted.[5]

[5] More: as Goldwater explained in its brief in support of the petition, the "or damaged" clause is self-executing, which means that even if Section 12-1122 did not exist, the property owners would still be entitled to proximity damages.

CONCLUSION

Section 12-1122(A)(2) applies whenever "property" is taken which is "part of a larger parcel." A negative easement is "property" protected by this statute. The statute was written out of a concern to protect property owners when incorporeal rights are taken—particularly including easements. The Court of Appeals improperly held otherwise, in part through a wrongful application of the *exclusio alterius* canon. Its decision should therefore be *reversed*.

Respectfully submitted this 24th day of September 2024 by:

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